

A **PERMODALAN NEGERI SELANGOR (PNSB) SETIAUSAHA
KERAJAAN NEGERI SELANGOR (PERBADANAN) v.
CITRASAMA PROJEK SDN BHD & ANOR
AND OTHER APPEALS**

B COURT OF APPEAL, PUTRAJAYA
 HAMID SULTAN ABU BACKER JCA
 HASNAH MOHAMMED HASHIM JCA
 ASMABI MOHAMAD JCA
 [CIVIL APPEAL NO: B-01(A)-289-09-2015,
C B-01(A)-1478-09-2015 & B-01(A)-304-09-2015]
 11 JANUARY 2017

ADMINISTRATIVE LAW: Judicial review – Appeal against – Infringement of terms of agreement – Claim for – Whether complaint or grievance amenable for judicial review – Whether there was presence of public law element necessary to attract remedies of administrative law – Whether infringement based on substantive principles of public law – Whether case involved private law relief – Whether a fit and proper case for judicial review

E The appeals herein were against the decision of the Judicial Commissioner ('JC') in allowing the applications by Citrasama Projek Sdn Bhd ('Citra') and Benua Ehsan Sdn Bhd ('Benua') for judicial review against Permodalan Nasional Selangor Berhad ('PNSB'), Setiausaha Kerajaan Negeri Selangor (Perbadanan) ('SSI'), Majlis Perbandaran Subang Jaya ('MPSJ') and the State Government of Selangor ('the State Government'). Pursuant to the joint venture agreements ('JVAs') and Power of Attorneys, Citra, Benua and
F PNSB became joint venture partners to develop and carry out a low density housing project and commercial development on the said project land. During the term of the JVAs, Citra and Benua together with PNSB applied for planning permission from the relevant technical departments including MPSJ in order to proceed with the development of the said project. On
G 8 December 2004, the State Government directed that building projects in highland areas bordering environmentally sensitive areas required the views of all technical departments. Citra and PNSB applied to extend the validity of the planning permission but was rejected by MPSJ as the Jawatankuasa Teknikal Pembangunan Kawasan Sensitif Alam Sekitar Negeri Selangor ('JTPKSASNS') had rejected the application on the ground that the
H development proposal involved land on a gradient categorised as Class IV. Citra, Benua and PNSB then filed a fresh application for planning permission. Subsequently, the Mesyuarat Jawatankuasa Teknikal Perancangan recommended that the decision of the application for planning permission be postponed pending the decision of the mesyuarat
I JTPKSASNS. MPSJ rejected the application on the grounds that the project would involve development of Class III and Class IV hill slopes. Dissatisfied

with the decision, Citra, Benua and PNSB filed their respective appeals to the appeals board. Subsequently, PNSB notified the appeals board that it would not proceed with the appeal because of the State Government's decision to cancel the project. Citra and Benua were notified of the State Government's decision not to proceed with the said project and that the JVAs had expired. Citra and Benua then filed an application for judicial review in the High Court seeking declaratory reliefs, injunction, specific performance and damages. The High Court, in allowing the application for judicial review, held that the JVAs were still subsisting and therefore, the State Government and PNSB could not vitiate the contract and that the decision by the State Government to revoke the development project was an unlawful administrative decision. Hence, this appeal.

Held (allowing appeals with costs)

Per Hasnah Mohammed Hashim JCA delivering the judgment of the court:

- (1) In a judicial review, the challenge of the use of the proper and appropriate procedure is very much fact based. The judge deciding on such matter must ascertain whether there is a public law element. In the instant appeals, MPSJ had rejected the application for development order in compliance with the State Government's guideline. The parties then appealed to the appeals board and had subsequently entered into a consent order. The appeals board fixed a mention date of the appeal and ultimately struck out the appeal. For the subject matter to be amenable for judicial review, there must be the presence of a public law element necessary to attract the remedies of administrative law. In the instant case, the claim was on analysis, purely a classic private law claim based on the terms of the JVAs entered between the parties. (paras 44 & 45)
- (2) Taking into consideration the factual matrix of the appeals, the appeals were not fit and proper case for judicial review. The appellants had rightly or wrongly terminated the JVAs and once the JVAs expired, then all planning permission related to the JVAs became academic. It was a clear case involving private law relief rather than public law relief. If the claim for infringement was purely passed on substantive principles of public law, then the proper process should be by judicial review. However, if the infringement was a mixture of both private and public laws, then the court must ascertain which of the two was more predominant. (para 46)
- (3) The claims against the appellants were based on private law *ie*, on the infringement of the terms of the JVAs due to the failure to procure the planning permissions as envisaged under the said agreements. As such, judicial review was not the proper process. The JC had erred when she had considered the claims as possessing public law element when in fact it was fairly obvious that the claims involved private law. (paras 49 & 50).

A *Bahasa Malaysia Headnotes*

Rayuan-rayuan di sini adalah terhadap keputusan Pesuruhjaya Kehakiman ('PK') membenarkan permohonan oleh Citrasama Projek Sdn Bhd ('Citra') dan Benua Ehsan Sdn Bhd ('Benua') untuk semakan kehakiman terhadap Permodalan Nasional Selangor Berhad ('PNSB'), Setiausaha Kerajaan Negeri Selangor (Perbadanan) ('SSI'), Majlis Perbandaran Subang Jaya ('MPSJ') dan Kerajaan Negeri Selangor ('Kerajaan Negeri'). Menurut perjanjian usaha sama ('PUS') dan Surat Kuasa Wakil, Citra, Benua dan PNSB menjadi rakan kongsi untuk membangunkan dan melaksanakan projek perumahan dan pembangunan komersial ke atas projek tanah tersebut. Citra dan Benua bersama-sama dengan PNSB memohon untuk kebenaran perancangan dari jabatan teknikal relevan termasuk MPSJ untuk meneruskan pembangunan projek tersebut. Pada 8 Disember 2004, Kerajaan Negeri mengarahkan semua projek pembangunan di kawasan tanah tinggi yang bersempadan dengan kawasan alam sekitar memerlukan pandangan semua jabatan-jabatan teknikal. Citra dan PNSB memohon untuk melanjutkan kesahihan kebenaran perancangan tetapi telah ditolak oleh MPSJ kerana Jawatankuasa Teknikal Pembangunan Kawasan Sensitif Alam Sekitar Negeri Selangor ('JTPKSASNS') menolak permohonan itu atas alasan bahawa cadangan pembangunan melibatkan tanah pada kecerunan dikategorikan sebagai Kelas IV. Citra, Benua dan PNSB kemudiannya memfailkan permohonan baru untuk kebenaran perancangan. Seterusnya, Mesyuarat Jawatankuasa Teknikal Perancangan menggalakkan supaya keputusan permohonan kebenaran perancangan ditangguhkan sambil menunggu keputusan mesyuarat JTPKSASNS. MPSJ menolak permohonan atas alasan bahawa projek akan melibatkan pembangunan cerun bukit Kelas III dan Kelas IV. Tidak berpuas hati dengan keputusan tersebut, Citra, Benua dan PNSB memfailkan rayuan masing-masing kepada lembaga rayuan. Seterusnya, PNSB memberi notifikasi kepada lembaga rayuan bahawa ia tidak akan meneruskan rayuannya kerana Kerajaan Negeri telah membuat keputusan membatalkan projek. Citra dan Benua dimaklumkan berkenaan keputusan Kerajaan Negeri untuk tidak meneruskan projek tersebut dan berkenaan pelupusan PUS. Citra dan Benua kemudiannya memfailkan permohonan untuk semakan kehakiman di Mahkamah Tinggi memohon relif pengisytiharan, injunksi, pelaksanaan spesifik dan ganti rugi. Mahkamah Tinggi, dalam membenarkan permohonan semakan kehakiman, memutuskan bahawa PUS masih wujud dan dengan itu, Kerajaan Negeri dan PNSB tidak boleh mencatatkan kontrak dan keputusan Kerajaan Negeri untuk membatalkan projek pembangunan adalah satu keputusan pentadbiran yang menyalahi undang-undang. Oleh itu, rayuan ini.

I

Diputuskan (membenarkan rayuan-rayuan dengan kos)

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Oleh Hasnah Mohammed Hashim HMR menyampaikan penghakiman mahkamah:

(1) Dalam satu semakan kehakiman, penggunaan prosedur yang teratur dan sesuai adalah berdasarkan fakta. Hakim yang membuat keputusan berkenaan perkara ini harus memastikan sama ada terdapat unsur undang-undang awam. Dalam rayuan-rayuan ini, MPSJ menolak permohonan perintah perancangan mematuhi garis panduan Kerajaan Negeri. Pihak-pihak kemudiannya telah merayu kepada lembaga rayuan dan telah memasukkan satu perintah persetujuan. Lembaga rayuan menentukan tarikh perbicaraan rayuan dan menolak rayuan. Untuk perkara ini diperbetulkan dengan semakan kehakiman, kehadiran unsur undang-undang awam perlu bagi meraih remedi undang-undang pentadbiran. Dalam kes ini, permohonan adalah atas analisa, tuntutan undang-undang persendirian semata-mata berdasarkan syarat-syarat PUS yang dimasuki oleh pihak-pihak terlibat.

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(2) Mengambil kira matriks fakta rayuan-rayuan, rayuan-rayuan ini bukan kes yang layak atau sesuai untuk semakan kehakiman. Perayu-perayu telah secara betul atau salah membatalkan PUS dan sebaik sahaja PUS tamat tempoh, maka, semua kebenaran merancang berhubung PUS menjadi akademik. Ini jelas kes yang melibatkan relif undang-undang persendirian dan bukan relif undang-undang awam. Jika tuntutan pelanggaran adalah berkenaan prinsip substantif undang-undang awam, proses yang betul adalah melalui semakan kehakiman. Walau bagaimanapun, jika pelanggaran adalah berdasarkan campuran kedua-dua undang-undang persendirian dan awam, mahkamah harus memastikan di mana antara kedua-dua itu adalah lebih utama.

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(3) Tuntutan terhadap pihak perayu adalah berdasarkan undang-undang persendirian, iaitu, pelanggaran syarat-syarat PUS akibat kegagalan mendapatkan kebenaran perancangan seperti yang digambarkan di bawah perjanjian tersebut. Oleh itu, semakan kehakiman bukan proses yang sesuai. PK terkhilaf apabila beliau mengambil kira tuntutan-tuntutan itu mengandungi unsur undang-undang awam tetapi pada hakikatnya jelas sekali tuntutan-tuntutan melibatkan undang-undang persendirian.

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Case(s) referred to:

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Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 5 CLJ 865 FC (*refd*)

Council of Civil Service Unions v. Minister for the Civil Service [1985] AC 374 (*refd*)

Ganda Oil Industries Sdn Bhd & Ors v. The Kuala Lumpur Commodity Exchange & Anor [1988] 1 CLJ 126; [1988] 1 CLJ (Rep) 56 SC (*refd*)

Kelana Megah Development Sdn. Bhd. v. Kerajaan Negeri Johor & Another Appeal [2016] 8 CLJ 804 CA (*refd*)

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- A** *Malayan Banking Bhd v. Association of Bank Officers Peninsular Malaysia & Industrial Court* [1988] 1 CLJ 276; [1988] 1 CLJ (Rep) 183 SC (*refd*)
Re Council of Civil Service Unions and Ors v. Minister for the Civil Service [1985] AC 374 HL (*refd*)
Regina v. Panel on Take-overs and Mergers, ex parte Datafin plc & Anor [1987] 1 All ER 564 (*refd*)
- B** **Legislation referred to:**
Rules of Court 2012, O. 53
Town and Country Planning Act 1976, s. 22
(Civil Appeal No: B-02(A)-1478-09-2015)
For the appellants - Lathika Prabhakaran & Maria Pereira; M/s Lathika & Assocs
- C** For the respondent - David Samuel, Parthiban Lourdesamy, Nadarajan Thanimalai, R Thanasegar Ramasamy; M/s Chambers of Firdaus
(Civil Appeal No: B-01(A)-289-09-2015)
For the appellants - Kamaruzaman Muhammad Arif, PY Chong & Sofiah Omar; M/s Kamaruzaman Arif, Amran & Chong
- D** For the respondent - David Samuel, Parthiban Lourdesamy, Nadarajan Thanimalai, R Thanasegar Ramasamy; M/s Chambers of Firdaus
(Civil Appeal No: B-01(A)-304-09-2015)
For the appellants - Naziiah Mokhtar, Selangor State Legal Advisor
For the respondent - David Samuel, Parthiban Lourdesamy, Nadarajan Thanimalai, R Thanasegar Ramasamy; M/s Chambers of Firdaus
- E** [Editor's note: Appeal from High Court, Shah Alam; Civil Suit No: 25-67-2011 (overruled).]
Reported by Suhainah Wahiduddin

F **JUDGMENT**

Hasnah Mohammed Hashim JCA:

- G** [1] There were three appeals before us arising from the same judicial review. The three appeals were against the decision of the learned Judicial Commissioner allowing the Citrasama Projek Sdn. Bhd. ('Citra') and Benua Ehsan Sdn. Bhd. ('Benua') applications for judicial review against Permodalan Nasional Selangor Berhad ('PNSB'), Setiausaha Kerajaan Negeri Selangor (Perbadanan) ('SSI') in Civil Appeal No: B01(A)-289-09-2015 Majlis Perbandaran Subang Jaya ('MPSJ') in Civil Appeal No: B01(A)-1478-09-2015 and the State Government of Selangor ('the State Government') in Civil Appeal No: B01(A)-304-09-2015.
- H** [2] We had, after hearing submissions from learned counsels for the appellants and the respondents, unanimously allowed the appeals.
- I** [3] The background facts are important to understand the context in which these appeals were brought.

Background

[4] Citra and Benua were involved in property developments. SSI is was the owner of the project land and PNSB, the lawful attorney of SSI. Pursuant to the joint venture agreements ('JVAs') and Power of Attorneys, Citra, Benua and PNSB became joint venture partners to develop and carry out a low density housing project and commercial development on the said project land. SSI as the owner of the project land assigned all its rights and powers to PNSB *vide* a 'Perjanjian Pengurusan dan Surat Kuasa Wakil' dated 24 June 1992.

[5] The JVA between PNSB and Citra was executed on 26 July 1995 and expired on 25 July 1999. Citra was unable to complete the development of the project on the said land within the agreed completion period and as a result, two supplementary agreements (SA) were executed extending the time to complete the project. The first SA was executed on 24 July 2003 followed by another SA dated 23 July 2008. There was no SA executed between the parties after 23 July 2008.

[6] The JVA between PNSB and Benua was executed on 14 June 2001. Unfortunately, Benua was unable to commence the development project on the said land and a SA was then entered on 14 June 2006 with the date of completion agreed by the parties to be 13 June 2010. No further SA was executed to extend time after the time lapsed on the said date. There was also no SA executed when the agreement expired on 13 June 2010.

[7] In the mean time, during the term of the JVAs, Citra and Benua together with PNSB applied for planning permission from the relevant technical departments including MPSJ in order to proceed with the development of the project land.

The First Planning Permission

[8] The first planning permission application was filed on 4 November 1998 by Citra and Benua. PNSB submitted applications for planning permission to increase the density of development sometime in May 2002. The applications were rejected as the land involved in the project had a slope gradient exceeding 25% and any earthworks would interfere with the existing buildings.

The Second Planning Permission

[9] Citra and Benua together with PNSB submitted the second applications for planning permission on 30 May 2003 to increase development density upon appeal by PNSB. MPSJ approved the planning permission on 22 March 2004.

- A [10] However, on 8 December 2004, the State Government directed that building projects in highland areas bordering environmentally sensitive areas required the views of all technical departments. The application will be reviewed and considered by a committee known as ‘Jawatankuasa Pembangunan Lereng Bukit dan Tanah Tinggi.’

B **Application For Extension**

- C [11] Citra and PNSB applied to extend the validity of the planning permission on 23 February 2005. MPSJ rejected the application for the extension on 1 August 2005 as the Jawatankuasa Teknikal Pembangunan Kawasan Sensitif Alam Sekitar Negeri Selangor had rejected the application on the ground that the development proposal involved land on a gradient categorised as Class IV.

The Third Planning Permission

- D [12] Citra and Benua together with PNSB then filed a fresh application for planning permission on 13 January 2006. MPSJ requested Citra and Benua to submit a new ‘Pelan Susunatur’ and the EIA report. On 21 April 2006, the Mesyuarat Jawatankuasa Teknikal Perancangan recommended that the decision of the application for planning permission was postponed pending the decision of the Mesyuarat Jawatankuasa Teknikal Pembangunan Kawasan Sensitif Alam Sekitar Negeri Selangor. The committee was of the view that all the land in question was not suitable for development as it fell within Classes III and IV. Almost 75% of the site consisted of areas with a slope gradient of more than 25°. MPSJ rejected the application on 14 August 2008 on the grounds that the project would involve development of Class III (25° to 25° gradient) and Class IV (less than 35° gradient) hill slopes. This was in compliance with a circular issued by the State Government. Dissatisfied with the decision of the MPSJ, the Citra and Benua together with PNSB filed their respective appeals to the appeals board.

The Appeal To The Appeals Board

- G [13] Dissatisfied with the decision PNSB, Citra and Benua filed their respective appeal to the appeals board. In the midst of the appeals on 2 April 2008, the State Government issued a new hill slope guideline entitled ‘Garis Panduan Perancangan Pembangunan di Kawasan Bukit dan Tanah Tinggi Negeri Selangor’ (‘the guideline’). The State Government decided that it would not approve development projects on highlands in Classes III and IV. On 2 June 2008, the Lembaga Perumahan dan Hartanah Selangor issued a circular directing local authorities to reject applications for development on Classes III and IV land.
- H
- I [14] Citra, Benua and PNSB entered into a consent order stating that MPSJ will determine the application of the new guideline with regards to the project. The appeals board proceedings was adjourned and convened

sometime in early 2011. PNSB then raised the issue that the JVs with Citra and Benua had expired and that the State Government decided to cancel the project.

[15] The appeals board directed PNSB to notify their stand on the JVs and fixed 30 March 2011 as a mention date. PNSB notified the appeals board that it will not proceed with the appeal because of the State Government's decision to cancel the project on 30 March 2011. When Citra and Benua attended the mention before the appeals board, their solicitors were notified that the appeal was struck out on 10 March 2011. They requested another date before the appeals board for clarification. The appeals board then fixed 8 April 2011 for the parties to submit on the validity of the appeals board's decision to strike out the appeals.

[16] On 8 April 2011, the appeals board agreed with PNSB that it could only withdraw the appeal with leave of the appeals board and that Citra and Benua ought to be given the right to be heard on the withdrawal and the striking out of the appeals. The appeals board was of the considered view that it was '*functus officio*' and could not alter its decision. The only remedy was to challenge the appeals board's decision through a judicial review.

[17] Citra and Benua were notified of the State Government's decision not to proceed with the said project and that the JVs had expired. As at 2011 there was no extension of the JVs when these JVs expired on 23 July 2008 and 13 June 2010 respectively.

[18] Citra and Benua then filed an application for judicial review in the High Court seeking declaratory reliefs, injunction, specific performance and damages.

[19] The High Court, after hearing and considering the submissions of both the parties, made the following orders:

- (i) A declaration that the joint venture agreements executed between PNSB, SSI and respondents are valid and subsisting;
- (ii) A declaration that MPSJ's decision dated 14 October 2008 rejecting the respondents' planning permission on the ground that the said project is developed on Class III and Class IV land, is null and void;
- (iii) A declaration that Selangor Government's policy in circular directive that it will not approve any development on Class III and Class IV slopes is null and void;
- (iv) A declaration that the appeals board's decision communicated on 30 March 2011 stating that the entire appeal proceeding is struck out and the mention date 30 March 2011 is vacated, is null and void;
- (v) A declaration that the appeals board's decision dated 8 April 2011 reaffirming its earlier decision striking out the entire appeal proceeding, is null and void;

- A (vi) A declaration that the Selangor Government's decision that the joint venture project is cancelled on the ground that the joint venture agreements with the respondents have expired, is null and void.
- (vii) Quashed MPSJ's decision dated 14 October 2008 rejecting the respondents' planning permission;
- B (viii) Quashed the State Government's policy that it will not approve any development Class III and Class IV slopes;
- (ix) Directed MPSJ to issue planning permission to PNSB, SSI and the respondents to enable them to carry out the said project;
- C (x) Quashed the State Government's decision stating the joint venture project is cancelled on the ground that the joint venture agreements with the respondents have expired;
- (xi) Quashed the appeals board's decision dated 10 March 2011 stating that the entire appeal proceeding is struck out and the mention date 30 March 2011 vacated;
- D (xii) Quashed the appeals board's decision dated 8 April 2011 reaffirming its earlier decision striking out the entire appeal;
- (xiii) Restrained PNSB and SSI from carrying out any transaction or dealing on the project land; and
- E (xiv) Ordered that PNSB and SSI to carry on and continue the joint venture agreements and Powers of Attorney executed for the said project and implement the said project.

F Findings Of The High Court

[20] The learned Judicial Commissioner was of the view that the letter dated 10 March 2011 was not a valid letter to vitiate the JVAs which were already given a new lease of life from PNSB's own letter of affirmation dated 3 March 2011. The JVAs was still subsisting and therefore the State Government and PNSB cannot vitiate the contract. Such unilateral conduct would be a wrongful administrative decision amounting to a breach of contract.

H [21] The JVAs were well within the realm of possibility to be performed and not frustrated. The objects and purposes of the JVAs could still be met if development was properly approved and carried out as per the terms of the JVAs.

I [22] In her judgment, Her Ladyship viewed that the decision by the State Government to revoke the development project was an unlawful administrative decision. As a result the respondents have deprived the applicants of their legitimate expectations *vide* their unlawful and invalid administrative decisions.

The Submissions Of Parties

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MPSJ's Submission

[23] Learned counsel for the MPSJ submitted that the learned Judicial Commissioner had erred when she found that the conduct of MPSJ was fickle. MPSJ had taken into consideration all relevant facts and laws including all directions and policies of the State Government technical requirements and was duty bound to make a decision which would best serve public interest and safety in compliance with s. 22 of the Town and Country Planning Act 1976 ('TPCA').

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[24] It was further submitted that the respondents failed to show that the 2008 State Government's directive was inconsistent with the provisions of the TPCA. Furthermore, no evidence was adduced to show that such a directive was *ultra vires* the powers conferred on the State Government.

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[25] When the State Government decided not to proceed with the development on 25 August 2010 *vide* EXCO-MTES No. 6/27/2010 PNSB withdrew the appeal and no longer wish to proceed with the project. The appeals board had informed all the parties and on 10 March 2011 made an order striking out the appeal ('March order'). Subsequently the appeals board fixed 8 April 2011 as the hearing date and upon hearing submissions from the parties made an order maintaining the March order to strike out the appeal.

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[26] Learned counsel further submitted that the appeals board had taken into consideration all relevant factors. The respondents were parties to the JVAs which had been terminated and both agreements were not extended. The land proposed to be developed belonged to PNSB and PNSB was entitled to withdraw the said appeal. The JVAs in effect meant that the subject matter of appeals no longer existed.

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The State Government's Submission

[27] It was submitted by the learned Federal Counsel that both the JVAs had expired and there was no extension of the said agreements. The State Government's decision not to proceed with the JVAs was commercial in nature.

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[28] Policy matter is not a within the purview of the courts as it emanates after consideration of a number of factors which are often non-legal in nature. The decision to make the policy and to terminate the JVAs are not amenable to judicial review. The disputes in relation to the JVAs were in fact private law matters.

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Citra And Benua's Submissions In Reply

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[29] Learned counsel submitted that MPSJ's decision dated 14 October 2008 rejecting the application for application for planning permission dated 18 March 2008 was true and valid. MPSJ had perused and reviewed all the

A project plans and details. MPSJ had directed Citra and Benua to submit the said application. MPSJ's decision dated 14 October 2008 was contrary to advice, comments and approval given by its technical departments.

B [30] Learned counsel further submitted that MPSJ's decision on 14 October 2008 was not in compliance with Selangor Structure Plan 2020 and Town and Country Planning Act 1976.

[31] The State Government's decision and PNSB's decision to cancel the project was valid because PNSB by its conduct and action had affirmed the JVAs.

C **Decision**

D [32] The appeals arose from the decision of the learned Judicial Commissioner allowing the plaintiffs' application for judicial review against the defendants. The application in this case was made under the supervisory jurisdiction of judicial review. Judicial review is not to interfere but to intervene where there is illegality, procedural impropriety or irrationality and possibly proportionality (*Re: Council of Civil Service Unions and Ors v. Minister for the Civil Service* [1985] AC 374 HL). The application before the High Court was a hybrid of both public and private law and within the discretion of the High Court to decide which of the two realms of law bears more weightage and relevance in the present dispute.

E [33] The plaintiffs applied for judicial review of the decision by MPSJ rejecting the application for planning permission due to the contravention to the Garis Panduan Perancangan Pembangunan di Kawasan Bukit dan Tanah Tinggi Negeri Selangor. The said guidelines was issued by the State Government to regulate the development on hill slopes in Selangor. The State Government at its weekly Majlis Mesyuarat Kerajaan Negeri on 25 August 2010 decided to revoke the housing project between the SSI with Citra and Benua on the basis of the non-compliance of the terms of the agreements. Furthermore, the JVAs were not extended after the terms of agreement expired on 23 July 2008 and 13 June 2010 respectively.

F [34] The defendants' application in the High Court was for judicial review with regards to the decisions made by the administrative body, ie, MPSJ, PNSB and the State Government. It is trite that the court will not conduct an examination into the merits of the decision but to the decision making process unless the decision was illegal, irrational and made with procedural impropriety.

G [35] We could do no better than to cite the Federal Court in the case of *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 5 CLJ 865 where it was held:

I It is necessary for a judge when deciding on such matter to first ascertain whether there is a public law element in the dispute. If the claim for infringement is based solely on substantive principles of public law then the appropriate process should be by way of O. 53 RHC. If it is a mixture

of public and private law then the court must ascertain which of the two is more predominant. If it has a substantial public law element then the procedure under O. 53 RHC must be adopted. Otherwise, it may be set aside on the ground that it abuses the court's process. But if the matter is under private law though concerning a public authority, the mode to commence such action under O. 53 RHC is not suitable. Much depends on the facts of the case. But generally the court should be circumspect in allowing a matter which should be by way of O. 53 RHC to proceed in another form. When the purpose of this rule is in the interest of good administration, then this rule must be adhered to, except in limited and exceptional circumstances.

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[36] If the claim for infringement is based solely on substantive principles of public law then relief must be by way of an application for judicial review under O. 53 ROC. However, if the matter is within the realm of private law though concerning a public authority, O. 53 ROC is not suitable.

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[37] Therefore, the pivotal issue to be determined by this court in this appeal is whether the appellant's complaint or grievance was amenable for judicial review. In order to qualify for judicial review there must be public law element in the decision made. It is therefore necessary to examine both the source of the power and the nature of the decision made.

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[38] Lord Diplock in the landmark decision of the House of Lords in *Council of Civil Service Unions v. Minister for the Civil Service (GCHQ case)* [1985] AC 374 said at p. 409 that for a decision made by a public entity to be amenable for judicial review:

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... the decision-maker must be empowered by public law (and not merely, as in arbitration, by agreement between private parties) to make decisions that, if validly made, will lead to administrative action or abstention from action by an authority endowed by law with executive powers, which have one or other of the consequences mentioned in the preceding paragraph. The ultimate source of the decision-making power is nearly always nowadays a statute or subordinate legislation made under the statute: but in the absence of any statute regulating the subject matter of the decision the source of the decision-making power may still be the common law itself ...

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[39] In these appeals the decision made by the appellants were not statute based but instead made pursuant to the terms of the JVAs entered.

The JVAs

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[40] The parties to the JVAs were Citra, Benua and PNSB. Clause 8.17 of the JVA expressly stated that the validity of the said agreement was for a period of four years expiring on 25 July 1999. The parties, however agreed to extend the JVA for a further five (5) years through the SA. By virtue of cl. 8.11 of the said JVA the agreement could be extended. The first SA was executed on 24 July 2003 and the second extension was dated 23 July 2008.

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A [41] By virtue of the extended terms the term of the aforesaid agreement with Citra expired on 23 July 2008 and the JVA with Benua expired on 13 June 2010. The State Government's decision to revoke the development project was obviously not an administrative decision but a commercial decision made based on the terms of the JVAs and after taking into consideration its rights and obligations under the said agreements.

B [42] In *Malayan Banking Bhd v. Association of Bank Officers Peninsular Malaysia & Industrial Court* [1988] 1 CLJ 276; [1988] 1 CLJ (Rep) 183, the Supreme Court held that the decision of a public body will only be quashed if it amounts to an absurd or perverse decision that is devoid of factual or evidential foundation:.

C The general principle would appear to be that it will usually be proper to treat a decision-maker's task of fact-finding and the drawing of factual inferences from established facts as falling within the decision-maker's jurisdiction, unless the decision-maker has reached absurd results or reached results absurdly. I should perhaps pause here to refer to my judgment in this regard in *Tanjong Jaga Sdn Bhd v. Minister of Labour and Manpower & Anor* [1987] CLJ Rep 368; [1987] 1 MLJ 124 where in dealing with the question of reasonableness I alluded (at pp 129-130) to Lord Diplock's exegesis in *Bromley London Borough Council v. Greater London Council & Anor* [1983] 1 AC 768 (at p 821) in regard to decisions that, looked at objectively, are so devoid of any plausible justification that no reasonable body of persons could have reached them, and it would not perhaps be amiss to refer in this context to Dunn LJ's assertion in *Regina v. Secretary of State for the Home Department, Ex parte Asif Mahmood Khan* [1984] 1 WLR 1337 (at page 1352) that 'The categories of unreasonableness are not closed

F [43] It was undisputed that Citra and Benua both had applied for the planning permissions but the applications were rejected by MPSJ. By a letter dated 3 March 2011, PNSB and SSI had specifically informed Citra and Benua that the JVAs with extension have duly lapsed. The JVAs were for a period of five years and any extension must be by mutual agreement in the writing of both parties (Re: cl. 8.11). After the first extension, there were no further applications for extension of time made between the parties thus the JVA with Citra expired on 23 July 2008 and with Benua expired on 14 June 2010. The JVAs laid down preconditions that Citra, Benua and PNSB must within the time stipulated procure the necessary approval of the planning plans. However, Citra, Benua and PNSB failed to obtain the approval of the planning permission. In the meantime, the contractual period of the JVAs were not extended after both agreements lapsed. The terms of the JVAs were clear and unambiguous that the parties were to obtain the approvals before the lapse of the agreement. In the instant appeals, the approvals were not procured and as a result the letters of termination were issued.

[44] In a judicial review, the challenge of the use of the proper and appropriate procedure is very much fact based. The judge deciding on such matter must ascertain whether there is a public law element. In the instant appeals, MPSJ had rejected the application for development order on 14 October 2008, in compliance with the State Government's guideline. The parties then appealed to the appeals board and had subsequently entered into a consent order. The appeals board fixed a mention date of the appeal and ultimately struck out the appeal in March 2011.

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[45] Having considered the persuasive authorities cited above, we conclude that for the subject matter to be amenable for judicial review there must be the presence of a public law element necessary to attract the remedies of administrative law. In this instant case we found that the claim was on analysis, purely a classic private law claim based on the terms of the JVAs entered between the parties. The decisions made by the appellants were made in pursuant to the terms of the JVAs. By the terms of both the JVAs, time was the essence of the agreements. After the extension of time expired on 23 July 2008 (the extended terms with the first respondent) and on 14 June 2010 the JVA with the second respondent, there were no further applications for extension of time. As the JVAs had lapsed, the first appellant issued the letter terminating the JVAs.

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[46] Taking into consideration the factual matrix of the appeals, the appeals were not a fit and proper case for judicial review. The appellants had rightly or wrongly terminated the JVAs and once the JVAs expired then all planning permission related to the JVAs became academic. It was a clear case involving private law relief rather than public law relief. We find support for the proposition based on the Federal Court's case of *Ahmad Jefri Mohd Jahri (supra)* where it was held that if the claim of infringement was purely based on substantive principles of public law, then the proper process should be by way of judicial review. However, if the infringement was a mixture of both private and public laws then the court must ascertain which of the two is more predominant. The Federal Court succinctly explained in *Ahmad Jefri's* case that O. 53:

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... out a specific procedure for an aggrieved party seeking relief, including a declaration, against a public authority on his infringed right to which he was entitled to protection under public law to follow. It is our view that when such an explicit procedure is created to cater for this purpose, then as a general rule all such application for such relief must commence according to what is set down in Order 53 of the RHC otherwise it would be liable to be struck off for abusing the process of the court.

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[47] The Court of Appeal explained the distinction between public law and private law in *Kelana Megah Development Sdn. Bhd. v. Kerajaan Negeri Johor & Another Appeal* [2016] 8 CLJ 804:

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- A Public law, we apprehend, governs relationships between Governments or public authorities and subjects, where the authority concerned has power in matters that affect the rights of subjects such as the matter before us that is land acquisition. Additionally, public law also governs relationships that are of direct concern to society such as criminal law. In short, public law powers cannot be exercised by any private individual or entity. Private
- B law on the other hand, deals with the relationships between private individuals or entities with which the State is not directly concerned, as in the relations between husband and wife, the law of contract and law of torts. Governments and public authorities too can be subjected to private law as in cases where the government contracts with a private individual or a corporation to enter into a transaction. Private law is the
- C counterpart to public law.

[48] The Supreme Court in *Ganda Oil Industries Sdn Bhd & Ors v. The Kuala Lumpur Commodity Exchange & Anor* [1988] 1 CLJ 126; [1988] 1 CLJ (Rep) 56 cited with approval the English Court of Appeal's decision in *Regina v. Panel on Take-overs and Mergers, ex parte Datafin plc & Anor* [1987] 1 All ER 564 wherein Lloyd LJ said:

- D If the source of power is a statute, or subordinate legislation under a statute, then clearly the body in question will be subject to judicial review. If, at the other end of the scale, the source of power is contractual, as in the case of private arbitration, then clearly the arbitrator is not subject to
- E judicial review ...

- [49] In the instant appeals before us, we are of the considered view that the claims against the appellants were based on private law ie, on the infringement of the terms of the JVAs due to the failure to procure the planning permissions as envisaged under the said agreements. As such
- F judicial review was not the proper process.

[50] We find that the learned Judicial Commissioner had erred when she had considered the claims as possessing public law element when in fact it was fairly obvious that the claims involved private law.

G **Conclusion**

- [51] Having considered the submissions by both learned counsels as well as all the materials placed before us and for the reasons as stated above, we unanimously allowed the appeals with costs of RM10,000 each here and below subject to allocatur. The High Court order is set aside. The deposit be
- H refunded.

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